Supreme Court, U.S.
FILED
JUN 29 1994
OFFICE OF THE CLERK

(3)

No. 93-1942

In The
Supreme Court of the United States
October Term, 1993

J. WALTER FEMLING and BLAINE COUNTY,
Petitioners,

vs.

EUGENE FARNWORTH,
Respondent.

Petition For Writ Of Certiorari
To The Idaho Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Petitioner's request for a Writ is based upon their belief that the Idaho Supreme Court does not understand the law of qualified immunity with respect to free speech issues. Petitioners contend that the Sheriff of Blaine County, State of Idaho, was entitled to an absolute qualified immunity as a matter of law even though the trial court did not apply the tests of *Pickering* and *Mt. Healthy*.

These arguments are without merit. The Idaho Supreme Court correctly interpreted the decisions of this Court very recently in Lubcke v. Boise City, 1993 Opinion No. 107, 93.19 I.S.C.R. 1086:

> Worrell argues on appeal that the question of qualified immunity should not have been submitted to the jury because it is a question of law for the court to decide. Worrell also claims instruction 18A is an erroneous statement of the law in that it includes the element of good faith. The question of whether clearly established law existed at the time of the alleged constitutional violation is a question of law. *Hunter v. Bryant*, _____ U.S. __ , ___, 112 S. Ct. 534, 537 (1991). As such, it is for the court, not the jury, to decide. Thus, if there is not a material issue of fact regarding what happened, the court makes the qualified immunity decision. This could occur

at a summary judgment motion, *Elliot v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), or at a motion for a directed verdict. *Krause v. Bennett*, 887 F.2d 362, 368 (2d Cir. 1989). If the court decides the defendant has qualified immunity, the defendant prevails on the § 1983 action. If the court decides in favor of the plaintiff, the question of whether a constitutional violation occurred would still be decided by the jury. We recognize, however, that there will be cases where the trial court will find that there are material issues of fact in dispute and that such precludes the court from ruling on the qualified immunity question (e.g., cases where clearly settled constitutional rights were violated if the plaintiff's testimony is believed but were not if the defendant's testimony is believed). The appellate courts are divided on how to deal with that situation. The Seventh Circuit Court of Appeals holds that the trial court still makes the determination of qualified immunity. *Simkunas v. Tardi*, 930 F.2d 1287, 1291 (7th Cir. 1991); *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988). Other courts have submitted the qualified immunity issue to the jury with special interrogatories which instruct the jury how to resolve the immunity issue depending on what facts it finds. *Brandenburg v. Cureton*, 882 F.2d 211,

216 (6th Cir. 1989). We adopt a third alternative, one used by the Second Circuit. The court should submit special interrogatories as to the factual dispute to the jury and then make its qualified immunity decision based upon the answers to the interrogatories.

> The better rule, we believe, is for the court to decide the issue of qualified immunity as a matter of law, preferably on a pretrial motion for summary judgment when possible, or on a motion for directed verdict. If there are unresolved factual issues which prevent an early disposition of the defense, the jury should decide these issues on special interrogatories. The ultimate legal issue whether, on the facts found, a reasonable (official) should have known he acted unlawfully is a question of law better left for the court to decide.

Warren v. Dwyer, 906 F.2d 70, 76 (2d Cir. 1990); *see McIntosh v. Weinburger*, 810 F.2d 1411, 1431, n 8 (8th Cir. 1987). In our view, this rule best protects the respective duties of the court (to rule on matters of law) and the jury (to

determine issues of fact) and thus furthers our state constitutional mandate to hold the right to a jury trial "inviolate." Idaho Cons. art. 1, § 7. . . .

. . . Under *Harlow*, Worrell is entitled to qualified immunity only if she did not violate clearly established constitutional law. Thus, Worrell should be immune from suit if: a) it was not clearly established law in 1986 that a public employee may not be terminated for her exercise of her First Amendment rights, and b) it was not clearly established in 1986 that an employee with a property interest in her job could not be terminated without being informed of the true reasons for the termination and without being given an opportunity to address those charges.

The question of whether Worrell is entitled to qualified immunity as to the procedural due process claim is easily resolved because it was clearly settled law as of 1985 that when public employees have a protected property interest in their employment, the due process clause requires that, prior to termination, the employees be given: a) oral or written notice of the reason(s) for the termination, b) an explanation of the employer's evidence, and c) an opportunity to present their side of the

story. *Cleveland Board of Educ. v. Loudermill*, 470 U.S. at 342, 105 S. Ct. at 1493 (1985). In light of the jury's findings that Lubcke was never told the true reason for her termination, we hold that Worrell violated clearly settled law and is not entitled to qualified immunity as to the procedural due process claim.

The question of whether Worrell is entitled to qualified immunity as to the First Amendment issue, is not as easily resolved. We do note that it is clearly settled law that government officials cannot terminate public employees for exercising their First Amendment rights to speak on a matter of public concern except in limited circumstances. *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S. Ct. 1731 (1968). . . .

. . . In 1983, the Supreme Court refined the *Pickering* analysis in *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983). In *Connick*, the Supreme Court explained that a court must first determine whether the speech involves a matter of public concern. If the speech involves a matter of public concern, the court must then engage in the *Pickering* balancing test. The Supreme Court noted that "[t]he inquiry into the protective status of the speech is one of

law, not fact." 461 U.S. at 148, n 7, 103 S. Ct. at 1690, n 7.

As a matter of law, the trial court need not submit the question to the jury. However, the determination of this question of law turns on the court's evaluation of evidence presented regarding the *Pickering* factors. The district court had the opportunity to hear and evaluate the evidence presented while this Court has only the cold record before it. Therefore, we deem it prudent to remand to the district court the determination of Worrell's entitlement to qualified immunity as to the First Amendment issue. If the court determines that Lubcke's speech was protected speech under the *Connick-Pickering* criteria, it should hold that Worrell is not entitled to qualified immunity because she violated clearly settled law in terminating Lubcke for exercising her First Amendment rights. In such event, the jury verdict against Worrell will stand. If the court determines that Lubcke's speech was not protected speech, the court should vacate the judgment against Worrell as to the First Amendment claim.

(93.19 I.S.C.R. 1092, 1093.) (Emphasis added.)

Also in 1993 the Idaho Supreme Court advised the lower courts in *Arnsen v. State*, 123 Idaho 899, 854 P.2d 242 (1993) to apply a three-part test to determine whether a party asserting qualified immunity is entitled to the defense:

(1) Was there a clearly-established law?

(2) Did the conduct of the party asserting qualified immunity violate a clearly-established right of the party claiming the violation?

(3) Was the conduct asserting qualified immunity reasonable?

In remanding the case to the trial court to determine whether Femling in his individual capacity was entitled to qualified immunity, the Idaho Supreme Court closely followed and cited *Harlow v. Fitzgerald*, 457 U. S. 800, 818, 102 S. Ct. 2727, 2738, 73 Law Ed. 2d 396 (1982) as well as *Anderson v. Creighton*, 483 U.S. 635, 640, 107 Sup. Ct. 3034, 3039, 97 Law Ed. 2d 523 (1987), and *Hunter v. Bryant*, 112 Sup. Ct. 534, 537, 116 Law Ed. 2d 589 (1991). *Arnsen v. State, supra* at 904.

Petitioners also claim that Farnworth was "released" from his "*Mt. Healthy* burden." Not so. The Idaho court specifically advised the trial court on remand to apply the test of *Mt. Healthy*.

> For guidance to the trial court on remand, we point out that once a public employee has established that the employee's activity was constitutionally protected, the employee then has the burden of showing that the protected activity was a substantial or motivating factor in the decision of the public employer to take adverse action against the employee's employment. If the employee carries this burden of going forward, the burden of going forward then shifts to the employer, who may avoid liability by showing by a preponderance of the evidence that the same decision would have been made absent the constitutionality protected conduct. *Mt. Healthy*, 429 U.S. at 287, 97 S. Ct. at 576, 50 L.Ed.2d at 484.

CONCLUSION

This case does not present a novel question regarding the concept of qualified immunity afforded government employers. The Idaho court simply held that the case would be remanded to the trial court so that it could properly apply the tests set forth in *Pickering* as well as *Mt. Healthy*. Simply stated, the Idaho court concluded that questions of fact were raised which precluded the trial court from granting summary judgment in favor of Femling on the issue of qualified immunity. Petitioners want this Court to grant Femling qualified immunity as a matter of law

before the cases herein referenced have been properly applied at the trial level. Until that is done it is impossible to determine exactly how or why Femling may be entitled to qualified immunity. No issues regarding qualified immunity are properly presented to this Court and the Court should deny the Writ. *Waters v. Churchill,* _____ U.S. ___, 62 U.S.L.W. 4397 (1994).

RESPECTFULLY SUBMITTED.

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June 20, 1994.